Supreme Court, U.S.
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No. 03-5

In The
Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinions of the Court of Appeals for the Sixth Circuit in Case No. 02-1893 dated September 12, 2002 and March 28, 2003, are unreported and reproduced in Respondent's Appendix ("Resp't App.") at 1-3 and Petitioner's Appendix ("Pet. App.") at 1a-3a, respectively.

OTHER RELEVANT MATERIAL

Prior opinion of the Court of Appeals for the Sixth Circuit are reported at 276 F.3d 876 (6th Cir. 2002) (Case No. 00-1879) and 172 F.3d 397 (6th Cir. 1999) (Case No. 97-2249), and are reproduced in Resp't App. at 4-17, and 18-44, respectively; and the Sixth Circuit's Docket Sheet and Petitioner's Supplemental Reply in Favor of its Motion to Intervene, filed on March 3, 2003, are unreported and reproduced in Resp't App. at 45-47, and 48-55, respectively.

JURISDICTION

The Court of Appeals for the Sixth Circuit entered its Order on March 28, 2003. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

COUNTER-STATEMENT OF THE CASE

A. Introduction

The Petition for Certiorari fails to satisfy any of the classic criteria for the issuance of the writ. The decision

below does not create a conflict in authority: It does not conflict with any opinion from any other federal court of appeals (or, for that matter, from any state court of last resort). The decision below does not conflict with this Court's precedents. Furthermore, contrary to Petitioner's claims, the Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene. Accordingly, the Petition should be denied.

B. Factual Background

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians (hereinafter "Lac Vieux" or "Tribe") is a federally-recognized Indian tribe located in Michigan's Upper Peninsula, and is the sole Plaintiff in the underlying case. Resp't App. 20. The underlying case involves Lac Vieux's challenge to a Detroit City Ordinance ("Ordinance") that creates preferences in the competition for lucrative casino developments based on the content of the competitor's political speech. Rather than participate in the unconstitutional selection process, Respondent Lac Vieux filed the underlying action in February 1997. In August of 1997, Petitioner Detroit, Detroit, L.L.C. (hereinafter "Detroit LLC") submitted a bid for one of these developments/licenses, but was denied a license. Pet't Pet. 2. Like every other developer who submitted a proposal, Petitioner signed a "Consent and Release," which effectively released the City from all claims against it arising out of the selection process. *See Barden Detroit Casino L.L.C. v. Detroit*, 59 F.Supp.2d 641 (E.D. Mich. 1999) (upholding validity of the waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000). One district court has already found, and the Sixth Circuit did not disturb on appeal, that this Consent and Release constitutes a release of any damages or claims,

including constitutional challenges. *Id.* at 658, 666; *Barden Detroit Casino, L.L.C. v. Detroit*, 230 F.3d 848, 857 (6th Cir. 2000).

Respondent filed the underlying case at bar challenging the Ordinance on February 26, 1997, yet Petitioner Detroit LLC waited until February 3, 2003 to seek to intervene in this matter.

C. Proceedings Below

In February 1997, Respondent Lac Vieux filed suit against the Michigan Gaming Control Board ("Board"), the City of Detroit, and the Mayor of Detroit, seeking to have the Ordinance declared unconstitutional. Resp't App. 22. In pertinent part, Respondent claimed that the Ordinance violated the free speech clause of the First Amendment by awarding preferences to parties "for their political support of a particular side of a controversial political issue." Resp't App. 25-26. Two entities, Atwater Entertainment Associates, L.L.C. and Greektown Casino, L.L.C., qualified for the preferences being challenged in this lawsuit. These two entities were allowed to intervene in May 1997. Resp't App. 22. Thereafter, the parties filed cross-motions for summary judgment. The district court granted the Defendants and Intervenors' Motion for Summary Judgment. Resp't App. 26-27.

On April 12, 1999, the Sixth Circuit reversed. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"); Resp't App. 20. The Sixth Circuit held that the Ordinance does implicate the First Amendment and remanded to the district court to determine if the Ordinance could satisfy strict scrutiny review. *Id.*; Resp't App. 44. On remand, the district court dismissed

Respondent Lac Vieux's case once again, finding that the Ordinance passed muster under strict scrutiny review.

On January 11, 2002, the Sixth Circuit reversed and remanded a second time, holding that the Ordinance is fatally unfair and is not the least restrictive way to achieve any compelling state interest. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir. 2002) ("*Lac Vieux II*"); Resp't App. 10-11. On April 12, 2002, the City of Detroit filed a Petition for Writ of Certiorari with this Court, challenging the Sixth Circuit's January 11, 2002 Judgment. This Court denied the Petition. *Detroit v. Lac Vieux Desert Band of Lake Superior Chippewa Indians*, 122 S.Ct. 2589 (2002).

On remand from *Lac Vieux II*, the district court declared that the Ordinance is unconstitutional, but denied Respondent Lac Vieux's request for additional relief. Currently, this case is pending before the Sixth Circuit on appeal for the third time. The court of appeals has entered an injunction pending appeal, and has ordered the case to be heard on an expedited basis. Resp't App. 3. Briefing was completed on July 16, 2003. The sole issue before the Sixth Circuit is whether the district court erroneously denied Respondent Lac Vieux's request for further relief.

Petitioner Detroit LLC failed to seek intervention in the present case until six years after this case was filed. Pet. App. 3a. It is undisputed that Petitioner has had knowledge of this case from its inception, that it participated in the City's casino developer selection process, and executed a "Consent and Release." The Consent and Release has been construed by at least one federal court to

be a waiver of the participants' right to challenge the constitutionality of the City's selection process. *Barden Detroit Casino L.L.C. v. Detroit*, 59 F.Supp.2d 641 (E.D. Mich. 1999) (upholding validity of the waiver), *aff'd on other grounds*, 230 F.3d 848 (6th Cir. 2000).

Petitioner argues that once it did seek to intervene in this case, Respondent Lac Vieux did not timely object. The only objection, Petitioner argues, came from the two previous Intervenors. Pet't Pet. 4. This is simply not so. Respondent Lac Vieux *did* timely file a Brief Opposing Detroit LLC's Motion to Intervene with the Sixth Circuit.[1]

The Sixth Circuit denied Petitioner's Motion to Intervene, determining that its Motion was not timely. Pet. App. 3a. The Sixth Circuit reasoned that the Motion was untimely because: (1) the litigation has been pending for more than six years; (2) there have already been two appeals to the Sixth Circuit (in which Petitioner Detroit LLC could have sought to participate, but failed to do so); and (3) final judgment has been entered in the case. *Id.* The Sixth Circuit also considered the date which Petitioner had standing to intervene and was aware of its interests in the litigation. *Id.*

[1] The Sixth Circuit's docket sheet for *Lac Vieux v. Detroit*, No. 02-1893/1996, indicates that the Court received Respondent Lac Vieux's Opposition on February 18, 2003, which was timely. Resp't App. 45-47. In fact, Petitioner filed a Supplemental Reply in Favor of its Motion to Intervene on March 3, 2003, specifically noting that it received Respondent Lac Vieux's Opposition. Resp't App. 48-55.

REASONS THE PETITION SHOULD BE DENIED

The Petition should be denied for the following reasons. First, the Sixth Circuit's Opinion creates no conflict with this Court's precedent or rulings in other circuits. Second, the Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene.

I. The Sixth Circuit's decision has created no conflict in authority.

Petitioner has not presented any argument to substantiate its assertion that the Sixth Circuit, through its denial of Petitioner's Motion to Intervene, has brought itself into conflict with a decision of this Court, a sister court of appeals or any state court of last resort. Contrary to Petitioner's assertion, the Sixth Circuit's decision is in accord with this Court's decision in *NAACP v. New York*, 413 U.S. 345 (1973), as well as other circuits' decisions.

In *NAACP*, this Court determined that:

> If it [the motion to intervene] is untimely, intervention must be denied. Thus, the court where the action is pending must be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion: unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. at 365. The Court then concluded that the district court's denial of the motion to intervene was proper because the lower court "could reasonably have concluded

that appellants knew or should have known of the pendancy of the . . . action"; "the record amply demonstrates that appellants failed to protect their interest in a timely fashion"; and "[i]t is apparent that there were no unusual circumstances warranting intervention." *Id.* at 366-70.

The Sixth Circuit's determination in this case is right on point – and surely presents no conflict – with this Court's decision in *NAACP*. As in *NAACP*, the Sixth Circuit could have reasonably concluded that Petitioner should have known of the pendency of this action. In fact, Petitioner Detroit LLC actually participated in the selection process that Respondent Lac Vieux challenged in 1997. Moreover, Petitioner does not claim it was unaware of the litigation. Also as in *NAACP*, the record amply demonstrates that the Petitioner failed to protect its interest in a timely fashion. Petitioner did not move to intervene for over six years – until this case was on appeal for the third time after the district court's final disposition. Finally, as in *NAACP*, there are no unusual circumstances warranting intervention in this case.

Likewise, the Sixth Circuit's determination in this case does not create a circuit split. The circuit court cases that Petitioner cites in its Petition as allegedly giving rise to a circuit split are limited by their facts, and/or do not stand in conflict with the Sixth Circuit's decision below. First, Petitioner cites *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), for the proposition that absolute measures of timeliness are not proper. Here, the Sixth Circuit did not apply an absolute measure of timeliness, but rather considered various factors, such as the point to which the suit has progressed, the circumstances militating against intervention and the length of time preceding the application during which Petitioner should have known of its

interest. There is no conflict between the case at bar and *Sierra Club*.

Petitioner also cites *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984), for the proposition that the mere length of time is not determinative of whether a motion to intervene should be granted, and that new and expanded negotiations may militate in favor of intervention. Again, the Sixth Circuit did not deny Petitioner's Motion to Intervene based on the lapse of time. Furthermore, Petitioner's assertion that expanded negotiations militate in favor of intervention in this case is inaccurate. The parties to this litigation have been involved in negotiations throughout the six-year duration of this case. The fact that the parties were involved in negotiations at the time Petitioner sought to intervene is not a new phenomenon that warrants intervention. There is no conflict between the case at bar and *United States v. Oregon*.

Next, the Petitioner cites two District of Columbia Circuit Court opinions to support its proposition that it is an abuse of discretion to deny intervention at this stage in the litigation. These cases are distinguishable and do not conflict with the case at bar. *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), involved a suit brought under the Labor-Management Reporting Act, wherein the Secretary of Labor filed action against the union based on complaints by the union's members that the union trusteeships were unlawful. *Id.* at 121. The district court determined that the trusteeships were, in fact, invalid and requested that the Secretary file a proposed decree to fashion the relief. *Id.* at 126. Prior to the district court's entry of its order, the union members that had filed the written complaints with the Secretary moved

to intervene. *Id.* at 122. The district court denied intervention, but the circuit court reversed. *Id.* at 121. The court held that while the motion to intervene was pending, two events occurred which warranted intervention. *Id.* at 126.

The first event was the district court's entry of judgment in that case. *Id.* The circuit court determined that the district court's opinion, which was issued approximately four months after the union members filed their original motion to intervene, bore out the union member's claim in that case. The second major event was the resolution of the *Trbovich v. UMWA*, 404 U.S. 528 (1972), *enforced sub nom. Hodgson v. UMWA*, 344 F.Supp. 17 (D.C. 1972). *Hodgson*, 473 F.2d at 126. Prior to the Supreme Court's decision in *Trbovich* (issued on January 17, 1972), the union members at issue did not have a right to intervene. *Trbovich*, 404 U.S. at 529-30. However, the Supreme Court's decision in *Trbovich* opened the door to intervention. *Id.*

Hodgson is vastly different from the present case. In *Hodgson*, the union members moved to intervene *prior* to the court's ultimate decision on the merits. *Hodgson*, 473 F.2d at 122. In the case at bar, Petitioner did not move to intervene in this case until *over one year after* the Sixth Circuit held that the Ordinance was unconstitutional, and *over eleven months after* the district court entered its judgment that the Ordinance is unconstitutional. In *Hodgson*, the union members' intervention rights were affected by a subsequent Supreme Court decision and the subsequent entry of a district court opinion in an interrelated case, both of which were issued in close proximity to the time the district court denied the union members' motion to intervene. *Trbovich v. UMWA*, 404 U.S. 528 (1972), *enforced sub nom. Hodgson v. UMWA*, 344 F.Supp.

17 (D.C. 1972). Nothing like this happened in the case at bar. Moreover, *Hodgson* turned largely on a construction of the Labor-Management Reporting Act and it imposed a bar to intervention by union members in a suit initiated by the Secretary. *Trbovich*, 404 U.S. at 531. That Act is not involved in the case at bar. There are no statutory construction issues in the case at bar. There is no conflict between the case at bar and *Hodgson*.

The other District of Columbia decision, *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001), is likewise distinguishable from the case at bar. Appellants in that case were originally represented in the district court by the United States. *Id* at 469. The district court granted summary judgment against the United States, which the United States decided not to appeal. *Id.* at 469-70. In order to preserve the right to appeal the district court's dismissal, the appellants moved to intervene. *Id.* at 470. The circuit court determined that intervention was proper in that case in order to prosecute an appeal. *Id.* at 471. However, in this case, there is no want for prosecution of an appeal – Respondent is vigorously appealing the district court's order. Moreover, a review of the district court's docket sheet in *Smoke* indicates that, unlike the case at bar, that case had not been pending for over six years, with two appeals to the circuit court concluded and a third one pending. *Ranson v. Babbitt*, No. 98-CV-1422 (D.C. filed June 5, 1998), *rev'd sub nom. Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001). There is no conflict between the case at bar and *Smoke v. Norton*.

Finally, Petitioner's assertion that the Sixth Circuit's intervention ruling in this case conflicts with *Januszieiwicz v. Sun Ship Building & Dry Dock Co.*, 677 F.2d 286 (3rd Cir. 1982), is also erroneous. The *Januszieiwicz* case involved an

employee's claim for disability compensation, wherein the intervenor, Aetna Insurance Company ("Aetna"), had paid the employee disability benefits under the employer's group health plan. *Id.* at 289. On remand to the Administrative Law Judge ("ALJ"), Aetna moved to intervene, seeking a conditional right to reimbursement of the benefits it paid to the employee. *Id.* at 289. The ALJ denied the motion to intervene, *inter alia*, because it was untimely. *Id.* at 292-93. However, the Third Circuit reversed, finding that intervention was not untimely because Aetna sought to intervene solely to protect its right to reimbursement for amounts already paid to the employee. *Id.* at 289, 293. Unlike Aetna, the Petitioner in the case at bar has not established that it has a vested interest in the case. Also, unlike this case, Aetna's intervention in *Janusziewicz* did not impose a burden on the action, and the existing parties did not object to its intervention. Here, Petitioner's intervention would significantly burden this case, because the Sixth Circuit may have to resolve additional issues, which would require extensive briefing, prior to ruling on the merits of the underlying case. For example, allowing Petitioner to intervene now would force a new round of briefing on the merits of the underlying appeal, thereby delaying a case that the Sixth Circuit has ordered to be heard on an expedited basis that was fully-briefed and ready for oral argument on July 16, 2003. Resp't App. 1-3. Also, here, the Respondent and other parties in the case have objected to Petitioner's intervention. Resp't App. 45-49. There is no conflict between the case at bar and *Janusziewicz*.

There is no conflict between the Sixth Circuit's ruling on intervention in the case at bar and either this Court's ruling in *NAACP* or the rulings of any of the circuit court

cases cited above. In fact, there is nothing in the opinions cited that hints that this Court or any of the others would have come to a different conclusion on the facts of the case at bar.

II. The standard of review in this case is abuse of discretion; and the Sixth Circuit did not abuse its discretion in denying the motion to intervene.

A. This Court should review the Sixth Circuit's Order for abuse of discretion.

Denial of intervention under Federal Rule of Civil Procedure 24(a) is generally reviewed *de novo*. *United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001). The issue of whether the motion for intervention was timely filed is, however, reviewed for abuse of discretion. *Id.* Petitioner asserts that because this case involves the First Amendment, even the timeliness issue should be reviewed *de novo*.

While the case styled *Lac Vieux Desert Band v. Detroit*, No. 02-1893 (6th Cir. filed July 15, 2002), involves remediation of Respondent Lac Vieux's First Amendment rights, Petitioner's Motion to Intervene does not. The issue before the Sixth Circuit on Petitioner's Motion to Intervene was whether it satisfied the intervention factors, not whether Petitioner's First Amendment rights have been violated. There has been no determination that Petitioner has standing to assert its professed First Amendment claim, nor has determination of that issue ever been properly before any court. And, in any event, Petitioner signed a waiver that has been held to effectively waive its rights to bring a constitutional challenge to the Ordinance

procedures at issue in this case. Before the Sixth Circuit is allowed to determine the merit of the substance of Petitioner's underlying claims, Petitioner must satisfy the procedural requirements to properly present those claims to the court. Therefore, because Petitioner's claims were never properly before the Sixth Circuit, that court did not have jurisdiction to rule on those claims and none of Petitioner's First Amendment rights are involved in the filing of a motion to intervene or the denial of that motion. For this reason, the standard of review applicable in this case is abuse of discretion.

B. The Sixth Circuit did not abuse its discretion in denying Petitioner's Motion to Intervene.

The Sixth Circuit denied Petitioner's Motion to Intervene on the basis that it was untimely. It is within the courts' discretion to deny intervention on this basis, standing alone. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). In ruling on whether a motion to intervene is timely, the Supreme Court has stated that the point to which the suit has progressed does not solely determine whether intervention is untimely, rather it is one factor to be considered. *Id.* at 366.

In *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981), the Sixth Circuit reiterated that intervention must be denied if untimely, and that one factor determinative of timeliness is the point to which the suit progressed. *Id.* In regard to the other timeliness factors, the court also stated that:

> Among the other circumstances to be considered are these: (1) the purpose for which intervention

> is sought; . . . (2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case . . . (3) the prejudice to the original parties due to the proposed intervenor's failure after he knew of or reasonably should have known of his interest in the case promptly to apply for intervention . . . (4) the existence of unusual circumstances militating against or in favor of intervention. . . .

Id. While the Sixth Circuit has continually noted that the above factors are probative, there is no indication that *all* these factors must be established, or that *all* factors are applicable in every timeliness determination.

In this case, contrary to Petitioner's assertion, the court did not "simply state[ ] that . . . the Motion of Detroit, L.L.C. must be denied as untimely." Pet't Pet. 9. The Sixth Circuit correctly noted that the above five factors are pertinent to a timeliness determination under Fed. R. Civ. P. 24, and further discussed the factors applicable in this case. First, the court addressed the point to which this suit has progressed, stating that "[t]his litigation has been pending for more than six years, with two prior appeals to this court." Pet. App. 3a. Next, the court spoke to the circumstances militating against intervention stating, "[t]he district court has now entered a final judgment, which is the subject of this third appeal." *Id.* Finally, the Sixth Circuit considered the length of time preceding the application during which Petitioner should have known of its interest, and Petitioner's argument that it had standing as of January 2002 and was aware of its interests as of that date. *Id.*

Accordingly, the Sixth Circuit did not abuse its discretion by denying Petitioner's Motion to Intervene because it did not merely consider the point to which the suit has progressed.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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